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In the Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND,
Petitioner

V.

DIANA L. SPIRT, et al.,
Respondents.

Brief of Amicus Curiae Public Employees Retirement System in Support of Petition For Writ of Certiorari to the United States Court of Appeal For The Second Circuit

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QUESTION PRESENTED

Does this Court's decision in *Arizona Governing Committee* v. *Norris* (1983) 463 U.S. ____, 103 S.Ct. 3565, 76 L.Ed.2d 1236 permit the awarding of retroactive relief in pension cases if such relief is defined to include adjustments to future pension benefit payments when the payments are based, in whole or part, on pre-*Norris* contributions?

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BRIEF OF THE PUBLIC EMPLOYEE'S RETIREMENT SYSTEM IN SUPPORT OF THE PETITION

This brief is filed on behalf of the Public Employees' Retirement System (PERS), an agency of the State of California, in support of the petition for certiorari.

INTEREST OF AMICUS

Amicus is presently a defendant in an action in District Court in which the petitioner seeks retroactive damages for members of a pension fund based on the fact that certain retired members currently receive sexually differentiated benefits.[1] The District Court has pending be-

1. *Retired Public Employees' Association* v. *State of California*, U.S.D.C., N.D. Calif. No. C-77-2008 WHO. The action was remanded to the District Court by the Ninth Circuit following this Court's granting of a petition for a writ of certiorari and then remanding the matter to the Ninth Circuit for further consideration in light of this Court's decision in *Norris. State of California v. Retired Public Employees Association* (1980) 103 S.Ct. 3492.

before it cross-motions for summary judgment. The motions deal almost exclusively with the effect of *Norris* on the petitioner's request for retroactive damages in the form of adjustments to future benefit payments. It appears virtually certain that regardless of how the District Court rules the matter will be appealed to the Ninth Circuit; clarification of this Court's *Norris* ruling, and its subsequent interpretation by the Second Circuit is thus of great importance to this amicus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 735 F.2d 23. An earlier opinion by the Second Circuit is reported at 691 F.2d 1054 (1982). The United States District Court for the Southern District of New York issued five opinions; (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9, and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (reported at 93 F.R.D. 627).

JURISDICTION

The petition for certiorari was filed July 11, 1984, following entry of judgment on May 21, 1984. The time for filing responses to the petition for certiorari was extended to, and including, September 9, 1984, by a letter of August 3, 1984, to the Solicitor General from the Clerk of the Court. Jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) (1982), which provides in relevant part:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such indivual's race, color, religion, sex, or national origin....

REASON FOR GRANTING THE WRIT

IN THE RETIRED PUBLIC EMPLOYEES CASE THE DISTRICT COURT HAS BEEN SQUARELY PRESENTED WITH THE QUESTION OF WHETHER OR NOT THIS COURT'S HOLDING REGARDING NONRETROACTIVITY OF ITS *NORRIS* DECISION APPLIES TO ALL PENSION PLANS

Retired Public Employee defendants have argued, in support of their summary judgment motion, that this court's holding regarding the nonretroactivity of damage awards in pension cases was intended to be uniformly applied. Relying on Justice Powell's statement that "as in *Manhart* holding employers liable retroactively would have devastating results. The holding applies to all employer-sponsored plans" (77 L.Ed.2d at 1263) combined with Justice O'Connor's statement that "ultimately, I find this case controlled by the same principles of Title VII articulated by the Court in *Manhart*" (77 L.Ed.2d at 1265) defendants argued that retroactive damages were not to be awarded in any pension case.[2]

But plaintiffs in *Retired Public Employees* have attempted to distinguish *Norris* on three bases. "First, *Norris* is an employer-operated pension plan." "Second, *Norris* is not a refund plan." And third "in the instant case, there is absolutely no question that the 'insurance exception' is inapplicable." Thus in *Retired Public Employees*, as in *Spirt*, plaintiffs seek to limit the general applicability of *Norris*.

In spite of distinctions between *Spirt* and *Retired Pub-*

2. Defendants in *Retired Public Employees* have accepted Justice O'Connor's ruling "that benefits derived from contributions collected after the effective date of our judgment [must] be calculated without regard to the sex of the employee." 77 L.Ed.2d at 1266. The entire focus of the action after remand by this court has been on the possibility of awarding damages based on contributions collected before the effective date of the *Norris* decision.

lic Employees the crucial similarity remains that in both cases the courts have been asked to apply the *Norris* decision on a case-by-case basis rather than giving the remedy holding of *Norris* universal applicability to all pension plans.[3] Accordingly amicus vigorously urges this court to grant the petition for certiorari filed in *Spirt* to resolve at least this one crucial issue: Are the lower courts free to examine each pension plan to ascertain similarities to, and differences with, *Norris* and then fashion specific remedies for each case based on those similarities and differences or is the *Norris* holding regarding non-retroactivity of damages to be uniformily applied to Title VII sex discrimination cases involving pension funds.[4]

Respectfully submitted,

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3. *Spirt* and *Retired Public Employees* do differ in that no insurance company is involved in *Retired Public Employees*. Also *Retired Public Employees* differs from both *Norris* and *Spirt* in that in *Retired Public Employees* no sexually differentiated pension benefits have been paid to any individual since January 1, 1977. All employees retiring since January 1, 1977 have received sexually undifferentiated pension benefits without reference to the dates of the individual's contributions.

4. Amicus does not argue that this court should reject the other issues raised by the petition for certiorari but merely stresses the importance of this issue.